

Burden of Proof Pertaining to the Exercise of Eminent Domain
Prepared for the Environmental Quality Council Subcommittee
on Eminent Domain
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The Subcommittee identified the concept of burden of proof as it appears during eminent domain proceedings as one area warranting additional study. Three questions were raised: (1) Where does the current burden of proof lie? (2) Is this appropriate? and (3) Do changes need to be made? This chapter describes the varying degrees of burden, and who, during each phase of a condemnation proceeding, must meet the burden of proof. Ultimately, it is the Subcommittee's responsibility to decide whether the current conditions are appropriate, and, if presumed to be inappropriate, what statutory changes would, if adopted, result in an improved set of conditions.

Burden of proof refers to either a party's duty to prove a disputed charge or assertion or a party's responsibility to demonstrate through evidence that a claim is true or desirable. Generally, the burden of proof lies with the party that brings a cause of action.

There are three distinct tiers of proof within the legal system, each progressively more difficult to meet. The first is a "preponderance of the evidence" which requires that evidence offered be sufficient to influence a fair and impartial individual to choose one side of an issue rather than the other. The second tier requires that any evidence produced be "clear and convincing". A more difficult burden than a preponderance of the evidence, clear and convincing evidence suggests that an assertion to be proved be highly probable or reasonably certain. These two tiers generally refer to civil cases. Finally, the highest burden of proof is "beyond a reasonable doubt". This burden is generally reserved for cases dealing with criminal matters.

Within the framework of the exercise of eminent domain, the burden of proof shifts between condemnor and condemnee as the process proceeds and is dependent upon which party is making an assertion. Initially, as provided in section 70-30-111, MCA, the plaintiff (condemnor) has the duty to show by a preponderance of the evidence that the public interest requires the proposed taking.

70-30-111. Facts necessary to be found before condemnation. Before property can be taken, the plaintiff must show by a preponderance of the evidence that the public interest requires the taking based on the following findings:

- (1) that the use to which it is to be applied is a use authorized by law;
- (2) that the taking is necessary to such use;
- (3) if already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use;
- (4) that an effort to obtain the interest sought to be condemned was made by submission of a written offer and that such offer was rejected.

In Lincoln/Lewis & Clark County Sewer District v. Bossing, 215 M 235, 696 P2d 989, 42 St. Rep. 318 (1985), the trial court found that the sewer district had not shown necessity for the taking of defendants' properties because it failed to demonstrate a reasonable present need or even a need in the reasonably foreseeable future to connect defendants to the sewer system. The condemnor had not carried its burden, and the order of the trial court was affirmed.

If the District Court determines that the plaintiff has met the burden of proof as required under section 70-30-111, MCA, the court must enter a preliminary condemnation order as provided in 70-30-206, MCA. Following the preliminary condemnation order, the defendant (condemnee) has 30 days in which to file a claim of just compensation. If the plaintiff fails to accept the defendant's claim for compensation, the District Court appoints a panel of condemnation commissioners.

Section 70-30-304, MCA, provides for an appeal by either party to the district court from an assessment by the condemnation commissioners. The Montana Supreme Court, in State ex rel. Dept. of Highways v. Donnes, 219 M 182, 711 P2d 805, 42 St. Rep. 1938 (1985), stated that the landowner has the burden in eminent domain proceedings to prove entitlement to just compensation in excess of that offered by the condemnor.

In cases in which the defendant claims that a condemnation is excessive or arbitrary, the burden falls upon the defendant. In Cenex Pipeline, LLC. v. Fly Creek Angus, Inc., 1998 MT 334, 292 M 300, 971 P 2d 781, 55 St. Rep. 1358 (1998), the burden to prove that Cenex acted in an arbitrary and capricious manner fell on the landowner. The Supreme Court determined that since the other impacted landowners were contacted regarding the pipeline proposal and all had reached a financial agreement concerning the necessary land, Fly Creek failed to prove that Cenex's action was arbitrary or capricious.

Montana's statutes require that parties engaged in an eminent domain proceeding, regardless of the stage in the process, must only fulfill the first level of burden of proof, that by a preponderance of the evidence, their assertion is correct.

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